

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| ELOUISE PEPION COBELL, <u>et al.</u> , |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| v. |) | Case No. 1:96CV01285 |
| |) | (Judge Robertson) |
| DIRK KEMPTHORNE, Secretary of the Interior, |) | |
| <u>et al.</u> , |) | |
| |) | |
| Defendants. |) | |
| _____ |) | |

**DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR LEAVE
TO DISCLOSE CERTAIN POTENTIAL HEARING EXHIBITS
AFTER THE SCHEDULED EXCHANGE DATE**

In opposing¹ Defendants' Motion for Leave to Disclose Certain Potential Hearing Exhibits After the Scheduled Exchange Date ("Defendants' Motion"), Plaintiffs advocate excluding from the upcoming hearing Data Completeness Validation reports ("DCV Reports")² which directly demonstrate the implementation of the Department of the Interior's 2007 Historical Accounting Plan – the very subject matter on which this Court has said it wishes to hear evidence during the October hearing. Plaintiffs were provided notice of the ongoing and pre-scheduled nature of the DCV work, as well as the intention to issue additional reports, through numerous references to it in the 2007 Plan and through a status report provided in the

¹ See Plaintiffs' Opposition to Defendants' Motion for Leave to Disclose Certain Potential Hearing Exhibits After the Scheduled Exchange Date (Dkt. No. 3383 (Sept. 4, 2007) ("Plaintiffs' Opposition").

² The overall report is tentatively titled "Department of the Interior Office of Historical Trust Accounting Data Completeness Validation Report - Interim Report, September 30, 2007." Regional reports are expected to cover the following regions: the Alaska Region (Juneau Area), the Pacific Region (Sacramento Area), the Western Region (Phoenix Area), the Northwest Region (Portland Area), the Great Plains Region (Aberdeen Area), and the Rocky Mountain Region (Billings Area).

Administrative Record (“AR”), facts which directly rebut Plaintiffs’ unfounded accusation that Defendants are somehow timing the exchange of these reports to gain an unfair litigation advantage at the eleventh hour.³ Moreover, Defendants’ Motion is not, as Plaintiffs incorrectly characterize it, an improper supplementation of the Administrative Record; to the contrary, Defendants’ Motion concerns potential hearing exhibits that did not exist prior to the completion of the AR and the 2007 Plan, but which reflect integral, ongoing work under the 2007 Plan that the Court has indicated it intends to examine during the hearing.

I. The DCV Reports Are Directly Relevant To The Subject Matter Of The October 10, 2007 Hearing.

A. The Court Stated That It Intends To Hear Evidence On What Interior Is Doing To Implement The Historical Accounting Plan.

In ordering the upcoming hearing, the Court stated that such a hearing is necessary to “review the accounting project in detail, and to do so in open court, where the government may present, and plaintiffs may test or challenge, the methodology and results of the accounting project up to the time of the hearing.” April 20, 2007 Order at 3 (emphasis added). During a subsequent status conference on June 18, 2007, the Court again indicated that, rather than a paper review of the AR and the 2007 Historical Accounting Plan, the Court intended to assess in further detail the work Interior is currently doing to implement its plan:

What this October trial is all about is going to be -- let me see if I can block this out for you, and I'll try to write this out for you. First, it's going to be about what you're doing and what you're not doing. All right? I mean, you're doing what you're doing; they think you should be doing a lot more. It's going to be about both

³ Defendants’ counsel disagree with Plaintiffs’ counsel’s recollections about the conversations held during the meet and confer for Defendants’ Motion. In any event, because Plaintiffs opposed the motion, their belabored points about the meet and confer are irrelevant.

of those things. Second, what would it cost to do the things that they say that you should be doing and you're not doing? Third, taking into account the cost, because that, I think, I'm required to do by the Court of Appeals, is what you're doing adequate? Is it an adequate accounting? And fourth -- and this is what you don't want to hear, but I think Mr. Gingold is entitled to at least a record on this point, fourth, what does it all add up to? Throughput versus what you can prove, what are the big numbers?

June 18, 2007 Hearing Tr. 76:20-77:10 (emphasis added). In keeping with that scope, Defendants intend to present testimony concerning the Data Completeness Validation Project (“DCV Project”), which is an integral part of the execution of the 2007 Plan (see par. B, below). The forthcoming DCV Reports, due on or about September 30, 2007, will provide the most current status of the DCV Project.

B. The DCV Reports Reflect Integral Work That Is Clearly Spelled Out In The 2007 Plan.

The DCV Reports, and other tests of data, are a fundamental element of Interior’s 2007 Plan.⁴ As the 2007 Plan explains, “Interior is also conducting a number of tests of the data in historical IIM accounting and land records systems to determine whether there is data integrity and completeness in the various systems.” See Plan for Completing the Historical Accounting Project of Individual Indian Money Accounts, U.S. Department of the Interior, May 31, 2007 (“2007 Plan”), Part I at 2. Beginning on page 17, under the heading “Data Completeness validation (DCV),” the 2007 Plan specifically addresses the DCV Project and explains its goals as well as the specifics of the project. Id. at 17-18. The 2007 Plan provides a more detailed explanation of the project, but its goals are “(1) identifying and resolving gaps in electronic data,

⁴ The fact that the DCV Reports are “interim” reports should not be surprising given the ongoing nature of the DCV Project. The interim nature of the reports simply recognizes that the reports can only address the ongoing work that has been completed to date.

(2) verifying the transfer of accounts and balances through system conversions (from paper ledgers to the IRMS and from IRMS to TFAS), and (3) assessing the integrity of the underlying electronic data.” Id. at 18. The 2007 Plan even provides a work schedule that includes work targets for “Data Validation” and “Completeness Testing” through Fiscal Year 2010. Id. at 24. Thus, the 2007 Plan confirms that these tests are ongoing in nature and part and parcel of the multi-year 2007 Plan. The DCV project is further referenced in several places elsewhere in the 2007 Plan. Id. at 28; 2007 Plan, Part II at 6, 14-15, 17.

Plaintiffs’ assertion that the September 30, 2007 DCV Reports cannot have “any bearing on the May 31, 2007 Plan,” Plaintiffs’ Opposition at 4, is plainly incorrect. As detailed above, even a cursory reading of the 2007 Plan reveals that the DCV Project not only has a “bearing on the May 21, 2007 Plan,” but it constitutes a key element of the data testing portion of the 2007 Plan. Indeed, it is curious that Plaintiffs would assert that testing transaction data is irrelevant when data validation is such an integral and costly part of the 2007 Plan. Plaintiffs also attach an earlier interim status report on the DCV Project to their Opposition and argue that it is evidence that the DCV Project is irrelevant to the historical accounting. See Plaintiffs’ Opposition at 5. In fact, the report they cite contradicts their claim. The report is the Data Completeness Validation Interim Status Report, dated June 12, 2007 (“June 2007 Status Report”) and was included as part of the AR. See AR, Bates No. 34-1-1 through 34-1-29. The June 2007 Status Report confirms the relevancy of the DCV Project. Its description of the DCV Project is consistent with the description of the DCV project in the 2007 Plan. Compare 2007 Plan at 18 with June 2007 Status Report at 1 (Bates No. 34-1-4). Like the 2007 Plan, it explains how data validation testing is integral to the issuance of the Historical Statements of Account. Id. If

Plaintiffs are instead contending that data validation testing is insufficient (Defendants assert it is not), such an argument only addresses the weight to be given the evidence, not its relevance as a potential exhibit and ultimate admissibility. Defendants intend to present testimony on the DCV Project because it represents important, current work being performed under the 2007 Plan.

Indeed, the statistics contained in the June 2007 Status Report demonstrate the highly probative nature of the DCV Project and give a preview of the information expected in the forthcoming DCV Reports. According to the June 2007 Status Report, FTI (an Interior contractor), as part of the DCV Project, has “successfully mapped 90,441,314 of the 92,172,762 IRMS and TFAS transactions in the electronic data through April 2007,” representing “98.2% of the total population of transactions matching the initial mapping criteria.” June 2007 Status Report at 20 (Bates No. 34-1-23). FTI has also mapped 95.5%, or 6,387,948 records of Treasury checks contained in the Check Payment and Reconciliation (“CP&R”) system back to data in IRMS and TFAS. Id. at 21 (Bates No. 34-1-24). Given Plaintiffs’ challenges to the integrity and completeness of the data on Interior’s systems, the DCV results, when updated in the DCV Reports, are probative of what Interior is doing to assess data completeness under the 2007 Plan.

Similarly unfounded is Plaintiffs’ assertion that Michelle Herman’s previous testimony in 2003 supports their theory that the DCV Reports have “nothing to do with the preparation of the HSA’s and nothing to do with the ‘various procedures . . . Interior is employing to test the accuracy and completeness of the HSA.’” Plaintiffs’ Opposition at 6. To be clear, Ms. Herman never testified in 2003 that the current DCV reports have “nothing to do” with the accuracy and completeness of the HSAs. Ms. Herman explained on direct examination that FTI had started performing the system tests under the 2003 Plan that involve “understanding of the

characteristics of the data before you begin your larger use of the information.” Trial 1.5 Hearing, Day 23 AM Tr. 32:8-10. Ms. Herman stated on cross-examination that “the tests that I have been performing so far are so that we can understand the characteristics of the data, and it is the actual testing to the documents that will support the validity of those transactions.” Trial 1.5 Hearing, Day 23 PM Tr. 8:2-5. Plaintiffs’ counsel then followed up by asking about the tests that had been performed thus far, and this led to the exchange quoted by Plaintiffs. Trial 1.5 Hearing, Day 23 PM Tr. 8:11-15. Ms. Herman’s testimony simply described the current status of her work in 2003 and in no way establishes that subsequent DCV reports are not related to the historical accounting and HSAs.

As described in the 2007 Plan, Ms. Herman’s work and the DCV Project are directly related to producing complete HSAs because such testing ensures that the HSAs will contain all transactions recorded during the electronic ledger era. It includes mapping debit and credit transactions within and between the IRMS and TFAS systems. 2007 Plan at 17-19. At the time of the 2007 Plan, the DCV project had mapped more than 97% of all money movements through IRMS and TFAS and, where detected in the mapping process, restored “missing transaction data from historical paper transaction registers.” 2007 Plan at 18. In any event, Plaintiffs will be free to cross-examine Ms. Herman in the upcoming hearing about the purpose of the DCV Project and the DCV Reports.

II. The DCV Reports Are Not Part Of The Administrative Record But Instead Are Potential Hearing Exhibits.

Plaintiffs also incorrectly assert that the DCV Reports are a supplement to the Administrative Record. See Plaintiffs’ Opposition at 9-11. They are not. The DCV Reports, to be completed on or about September 20, 2007, are potential hearing exhibits that contain some

information that did not exist at the time the AR was completed and, thus, could not have been relied upon for the 2007 Plan. Therefore, Plaintiffs' argument that using the DCV Report as an exhibit runs afoul of the Administrative Procedure Act and related case law, is inapposite.

Defendants are not attempting to supplement the AR and the Court has not issued an order, nor have the parties agreed, that exhibits at the October hearing are limited to items contained in the Administrative Record. Quite the opposite is true. As set forth in Part I, A, supra, the Court has indicated that it anticipates evidence in addition to the AR, including testimony about what Interior is currently doing. Defendants intend to present testimony about the DCV project; the DCV Reports at issue here will aid the Court in understanding that testimony and Interior's ongoing work.

III. There is Good Cause And No Undue Prejudice To Plaintiffs In Permitting Defendants To Provide The DCV Reports As Potential Exhibits After The Scheduled Exchange Date.

Defendants should not be precluded from using the DCV Reports as potential exhibits because the timing of their release is wholly independent of the trial schedule. As set forth in the 2007 Plan, there is a Fiscal Year work schedule for DCV Work, 2007 Plan, Part I at 24; thus, their September 30, 2007 projected completion date is not nefarious. Indeed, Defendants did not wait until then to file this Motion and did so before the scheduled exchange date to alert the Court of this issue and to put all parties on notice that these reports are expected. Under the circumstances, no basis exists to conclude that Defendants are somehow strategically holding these reports back for litigation surprise.

At the same time, it should come as no surprise to Plaintiffs that additional DCV Reports are being issued. Defendants filed the June 2007 Status Report with the AR; it states that "[a]n

Overall Report will be issued outlining the details of validations performed on the IRMS and TFAS data relating to all regions collectively. Individual Data Completeness Validation Reports for each region (*Region Reports*) will be issued with the *Overall Report* which will address the specific aspects of the Data Completeness Validation work associated with each of the individual regions.” See June 2007 Status Report at 1-2 (Bates No. 34-1-4 – 34-1-5). The June 2007 Status Report also clearly states that the tests being performed are “ongoing and iterative in nature[,]” Id. at 9 (Bates No. 34-1-12). Moreover, Plaintiffs and their experts will have several days, perhaps weeks, to review these reports before Defendants present testimony about the DCV Project, they will have ample opportunity to cross-examine any witnesses that testify about the DCV Project, and they will certainly have had weeks before their own witnesses testify. Also, since expert reports were due before the exchange of exhibits, the late exchange of the DCV Reports could not possibly have affected the content of Plaintiffs’ experts’ reports. Under the circumstances, Plaintiffs would not suffer any unfair prejudice.

Dated: September 11, 2007

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that, on September 11, 2007 the foregoing *Defendants' Reply in Support of Their Motion for Leave to Disclose Certain Potential Hearing Exhibits after the Scheduled Exchange Date* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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